SOCIAL ACTION

The CONSTITUTION and SOCIAL ISSUES

by

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CONTENTS

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The Constitution and Social Issues

Introduction

When the Supreme Court nullified in 1935 certain leading measures adopted under the administration of President Franklin D. Roosevelt, another controversy was added to the long list of constitutional disputes. Shortly after the Court declared invalid the principal features of the National Industrial Recovery Act, President Roosevelt, at a press conference, spoke "with some asperity" of the decision. He expressed the opinion that the Court had taken the country back to "horse and buggy days," and hinted at the possibility of amending the Constitution in such a manner as to permit the social and economic legislation which he was sponsoring.

Somewhat later, the President urged Congress to pass the Guffey-Snyder Bituminous Coal bill, despite constitutional objections raised against it by critics and opponents. He said that no one could tell in advance whether the act would stand the constitutional test, "for the simple fact that you can get not ten, but ten thousand different opinions on the subject." He remarked that it would be "helpful" to secure a ruling of the Court on the matter, and then closed:

> "I hope your committee will not permit doubts as to the constitutionality, however reasonable, to block the suggested legislation."

In accordance with historic practice, opposition leaders rallied to the support of the Constitution and charged President Roosevelt with improper conduct in the matter. Representative Snell, Republican leader in the House, declared that "the constitutional limits within which the government must operate long have been clearly defined," that the President knew these limits, and yet, to satisfy his "whims," would proceed on the course to ruin. Then Mr. Snell hinted at impeachment.

> "In pursuing his headstrong course President Roosevelt has come perilously close to what some people call impeachable grounds."

Thus it happened that the social and economic measures coming under the head of "the New Deal" are being transformed into constitutional issues. If the Supreme Court declares more of them invalid, the Democratic party will be in a dilemma. It will be compelled to abandon fundamental measures on which it has staked its fortunes, or to go to the country with a provision for amending the Constitution.

In that case, as a matter of course, the Republicans will have the choice of opposing or supporting the amendment. Tactics as well as conviction will suggest opposition. Should events so turn out, then the social and economic merits of recent federal legislation will be mingled with a "high and wide" debate on the nature of the federal Constitution, if not entirely lost in a constitutional wrangle. In such circumstances some exact knowledge of the Constitution, its nature and history, will be useful to those who prefer facts to fog, and believe that knowledge is more helpful than mere off-hand opinions in the elucidation of public questions.

I. Constitutional Debates Under the American System

Social Questions are Constitutional Questions

Under the American system of government every large issue of policy in matters social and economic becomes at once a legal or constitutional issue. Is it a question of regulating child labor, providing unemployment insurance, prescribing minimum wages in sweated industries, taxing lotteries, teaching a foreign language in the public schools, taxing chain stores? At once the problem of constitutional powers is raised, and the history and nature of the Federal Constitution are brought into consideration.

Nor does it make any difference whether the Federal Government or state and local governments are affected by the discussion. All legislatures from the Congress at Washington down to village councils are subject to the limitations of the Federal Constitution. All administrative authorities from the President in the White House to the town mayor or selectmen are controlled by the same instrument.

If the constitutional question is not raised by the advocates of any economic or social measure, it will certainly be brought forward by their opponents. And if the measure is enacted into law, despite legal objections, then it will almost surely be carried into the courts by interests adversely affected. And the courts, from village justices of the peace to the Supreme Court at Washington, enjoy such magisterial authority that they can declare acts of legislatures null and void on the ground that they violate the Constitution of the United States. On one occasion in Maryland a justice of the peace held a law of that state invalid, as contrary to the federal Constitution; and, though reversed by the higher courts of Maryland, the bold justice of the peace was sustained by the Supreme Court at Washington.

How does it happen that all social questions in the United States are constitutional questions?

In Great Britain this is not the case. There a social or economic proposition calling for legislative action raises only one issue: Is it wise, desirable, expedient, and imperatively required by the state of things, or by an insistent public opinion? There Parliament is supreme. It may enact laws of any kind and on all subjects. No written constitution limits its powers. No court can call in question the legality of its acts. In Great Britain social and economic questions can be discussed solely on their merits, without the intervention of lawyers and specialists on constitutional interpretation.

The contrast offered by the United States is due to the fact that here all powers of government are subject to the Constitution, a written document, the fundamental law of the land. In this document the powers of all departments of the Federal Government are set forth, and the powers of state and local governments are limited by specific restraints. Moreover, it imposes certain restrictions on both the Federal Government and the state government; so that neither separately nor in combination can they violate prescribed rights of person and property.

Hence the very proposal to enact any social or economic policy into law raises the issue: Has Congress, the state legislature, or the town council, as the case may be, the power to pass this act?

Why the Uncertainty?

This statement of facts raises another question. Why does a document written in simple English and occupying only ten or fifteen printed pages excite so much difference of opinion concerning its meaning? Is it not so clear that he who runs and reads can understand?

The answer is that the Constitution is divisible into two parts. Many passages are so plain and specific as to admit of no doubt respecting their commands. For example:

> "No person shall be a representative who shall not have attained to the age of twenty-five years. . . . The Senate of the United States shall be composed of two Senators from each State . . . . [The President] shall hold his office during the term of four years."

If all passages were so precise, no differences of opinion, no uncertainty as to meaning, could arise to perplex the public.

On the other hand, many clauses of the Constitution are broad and general in nature. This is especially true of the provisions that touch the powers of Congress and of the state governments. For instance:

> "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and the general welfare. . . . No person shall. . . . be deprived of life, liberty, or property without due process of law. . . . Nor shall any state deprive any person of life, liberty, or property without due process of law."

What is the "general welfare"? What is "property"? Does it include the air above through which radio messages flash? What is "liberty"? What is "due process of law"? Congress may "establish . . . . post roads." May it *build* post roads under this clause? Congress may regulate commerce between the states. What is interstate commerce? It is these broad and general passages of the Constitution which are drawn into question when the powers of government to deal with social and economic policies are under consideration.

It is not merely separate clauses of the Constitution that are open to diverse interpretations. The very nature of the Constitution itself is a subject of dispute. Is it to be interpreted strictly, narrowly, and rigidly, on the assumption that the framers of the document intended to give Congress the least possible power within the limits prescribed? Or is it to be interpreted broadly, generously, and liberally, on the assumption that they intended to give Congress a wide latitude in dealing with the issues before it?

These questions arise also when social and economic issues and specific powers of Congress are brought under consideration. Upon the answers to the large questions touching the nature of the Constitution will depend answers to specific questions that appear in connection with interpreting the broad and general clauses of the Constitution. Is the spirit to illuminate the letter, or the letter to kill the spirit?

The Free-For-All Discussion

Into the debate over such issues all literate citizens feel competent to enter. From cracker-barrel philosophers at crossroads stores to the justices of the Supreme Court in Washington,

American citizens engage in the business of expounding and interpreting the Constitution.

Great domestic conflicts have turned on the discussion. Into the Civil War the constitutional issue entered. The Confederate states claimed to be exercising a constitutional right when they seceded from the Union. Lincoln waged war in the name of the Constitution, to preserve the Constitution.

Even judges of the Supreme Court have differed. Often they have divided five to four over the meaning of the Constitution. Occasionally the Court has even reversed itself, that is, it has declared a law unconstitutional and then later declared it constitutional, or *vice versa.* In this way it has expressed one opinion in one year, and the opposite opinion in another year.

Editors, columnists, business men, labor leaders, Daughters of the American Revolution, and prominent club women make solemn pronouncements on the subject. Judging by speeches reported in the press, some of these debaters could not pass even a high school examination on the Constitution—its history and interpretation. But lack of knowledge seems to be no deterrent, and the great discussion goes on "without fear and without research." People who would not think of expounding Einstein have no hesitation in "telling the truth about the Constitution."

How Can Knowledge of the Constitution be Acquired?

Yet all will admit, probably, that some knowledge of the document and its history is appropriate to an intelligent discussion of its meaning, especially the parts that are broad in terms and open to varying interpretations. Where is this knowledge to be sought?

First of all, there are the records of the Convention which framed the Constitution in 1787. These include the *Journal* of the Convention showing the votes cast on various resolutions, as the framers built up the document piece by piece. No steno-

graphic minutes were taken of the debates on the resolutions, but Madison made copious notes, and other members wrote memoranda. These, too, are embraced within the records of the Convention and throw light on the purposes and meaning of several provisions, and on the general spirit and intentions of the delegates.

To the *Journal* and notes on debates must be added hundreds of letters written by members of the Convention expounding many parts of the Constitution to their friends. With the records of the Convention must be associated the *Federalist,* a series of papers written by Jay, Hamilton, and Madison in defense of the Constitution while its ratification was pending. The above records alone fill three or four huge volumes of print.

But the records of the Convention are merely the beginning of the list. Thousands of pages of Congressional debates and Presidential Messages are devoted to constitutional questions. They also throw light on the meaning of the document as it has been interpreted from generation to generation. Who has read them all?

Then there are the opinions of courts, high and low, including the opinions of the Supreme Court of the United States scattered through about 300 volumes. To these primary sources of information must be joined the writings of commentators on the Constitution, such as Story, Kent, Watson, and Willoughby.

How do Experts Work at Interpreting the Constitution?

Given the Constitution and all the above explanatory records, how do specialists go about expounding the meaning of the Constitution in general and particular, especially the clauses open to diverse interpretations?

The practice of the Supreme Court may be used to illustrate the answer. It makes use of the records. It quotes passages from the debates in the Convention of 1787, from Congres-

sional debates, from previous decisions. Sometimes it uses the dictionary in expounding the meaning of particular words.

On some occasions the Court limits its analysis to a single clause of the Constitution. On others it groups several clauses together, and extracts a power not expressly given to Congress from a group of clauses conferring specific powers.

If the specific words of the Constitution are not enough to support a conclusion, reference may be made to "its general spirit." In the Dartmouth College case, Chief Justice Marshall declared that the framers of the Constitution "could never have intended to insert in that instrument" an idea "repugnant to its general spirit." Long afterward another judge maintained that there are some limitations not clearly expressed in the Constitution "which grow out of the essential nature of all free governments."

With respect to the powers of Congress, there are two clauses which give a wide range to interpreters. One is the "general welfare" clause. Oceans of ink have been spilled on that subject. And the meaning of the words is still disputed. The other is the "necessary and proper" clause: Congress has power "to make all laws necessary and proper for carrying into execution the foregoing powers. . . ."

What does the word "necessary" mean? Does it mean absolutely necessary—so necessary that Congress could not carry out its specific powers without the supplementary exercise of power? If so, why did not the framers of the Constitution say "absolutely necessary," instead of merely "necessary"?

Chief Justice Marshall refused to insert the "absolutely" into the Constitution. He remarked that "a thing may be necessary, very necessary, absolutely or indispensably necessary." He interpreted the single word to mean "needful," "requisite," "essential," "conducive to." Then he concluded:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Hence when Congress does not have the specific power to enact a given bill, it may nevertheless enact it if the bill is necessary and proper to carry into effect a specific power, or specific powers. This gives Congress a generous leeway, if the Supreme Court at the moment is inclined to be generous in its opinions.

Intrepreters of the Constitution also make use of another device, namely, "implied" powers. A specific power carries implications. For example, Congress has the power to establish post offices. It is not authorized in so many words to charge a fee for carrying letters, or to punish criminals who steal letters; but the power to do these supplementary things is *implied* in the power to establish post offices.

Under the head of implied powers some amazing interpretations of the Constitution have occurred. Chief Justice Marshall made extensive use of the doctrine, and he was a contemporary of the men who framed the Constitution. He was not a member of the Convention of 1787, but he was a delegate to the Virginia ratifying convention. It may be assumed that he was fairly familiar with the purposes and meaning of the document.

Who is Entitled to Interpret the Constitution?

It is sometimes supposed that the Supreme Court is the final interpreter of the Constitution in all matters. This is due to a misapprehension. The Supreme Court only passes upon those constitutional questions which are brought before it in the form of law suits. Thousands of state and federal statutes are never taken up to the Supreme Court for an opinion as to constitutionality. They are enforced as they stand. In these cases the judgment of the legislators who pass and the executive who signs prevails. Hence legislators interpret the Constitution. They take an oath to support it and are bound to

respect its provisions as they understand the terms. Executives also interpret the Constitution. The President of the United States has vetoed bills on the ground that he deems them unconstitutional, even though passed in due form by Congress.

In practice, the latest interpretations by the Supreme Court—as far as they go—are regarded as binding and requiring the respect and obedience of all citizens. In cases not challenged and settled by that tribunal, the interpretations of Congress and the President, expressed in law, are likewise treated as effective and obligatory. Yet the opinions of Congress may be disregarded by the President, or those of the President may be ignored by Congress.

Nor do members of Congress or political leaders always treat an interpretation by the Supreme Court as forever beyond reconsideration. Speaking of the Dred Scott decision of 1857, Abraham Lincoln said:

> "We think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this."

II. The Powers of the Congress of the United States

Interpretation of the Powers of Congress the Supreme Issue

From the establishment of the Federal Government to the latest hour, the supreme constitutional issue has been the power of Congress to deal with the exigencies of government. In connection with this issue two questions have arisen. What was the intention of the framers of the Constitution in the matter of Congressional power? How shall the provisions of the Constitution in this respect be interpreted—narrowly or broadly? The answers to these questions must be sought in the records of the Convention, in decisions of the courts, and in practices of statesmen acting under the Constitution.

The Theory of Enumerated Powers

By one school of thinkers it has been contended that Congress possesses only enumerated powers, and no general power whatever. According to this theory the problem of the power of Congress is easily solved. All that one needs to do is to read the list of powers conferred on Congress by Section 8 of Article I and then examine the specific restraints laid on Congress by the various limiting clauses.

This conception of the Constitution is engaging in its simplicity, and is impressive until examined in the light of the facts in the case. Did the framers of the document so regard their handiwork? Has any school of politicians, either Democratic or Republican, ever observed the theory in practice? Or is it a mere theory formulated without historical warrant, and used for convenience in the contests of the forum?

The Broad View of the Framers

An indisputable record discloses the intention of the men who drafted the Constitution. The first item in the record is the resolution of the Congress under the Articles of Confederation calling the Constitutional Convention of 1787. The fundamental and express purpose of this action was to "render the federal constitution adequate to the exigencies of government and the preservation of the Union." The new instrument to be drawn up at Philadelphia was to be made adequate to the exigencies of government. The Convention was instructed to do more than compile a list of new powers to be conferred upon the old confederate government.

The second item in the record is a resolution adopted by the Convention setting forth its convictions and intentions with respect to the powers to be conferred on Congress. On May 29, the very first day after the organization of the Convention had been completed, Randolph of Virginia presented a general plan which contained this resolution. On May 31, it was approved and spread upon the record as a controlling principle. Later,

on July 17, it was made still stronger by an amendment which was adopted after a few minutes debate. The resolution in question reads:

> "That the legislature of the United States ought to possess the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases for the general interests of the Union, and also in those cases to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

It is evident from this resolution that the Convention intended to confer upon Congress a broad power to legislate "in all cases for the general interests of the Union."

Along with other provisions, this particular resolution was referred by the Convention to "the Committee of Detail" with instructions to formulate a draft of the new Constitution for further consideration. In other words, when the Committee began to draw up the Section conferring powers on Congress, it had before it this command, this declaration of purpose, as a guide and mandate in the elaboration of details. The Convention was the principal; the Committee of Detail was the agent.

Now the Committee of Detail consisted of five delegates, all of whom took the broad view of the work in hand and expressed, in one form or another, the firm conviction that the new Constitution should be adequate to the exigencies of government. In other words, they were men in complete sympathy with the declared purpose of the Convention and not at all inclined to thwart or defeat it.

For about two weeks the Committee of Detail worked on the draft of the Constitution, and on August 6 they presented it to the Convention for debate, amendment, and adoption. The Section dealing with the powers of Congress contained a list of so-called specific powers, and closed with the general provision giving Congress the power "to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof."

Although the paragraphs of the Section dealing with "specific powers" were altered in some respects, this paragraph was adopted with a single change: "that" was altered to read "which."

In the light of the resolution previously adopted by the Convention instructing the Committee of Detail, given the known views of the members of that Committee, can there be any doubt that the Convention intended to confer upon Congress a broad and general power "to legislate in all cases for the general interests of the Union"? Certainly the Convention did not confine the Constitution to a mere enumeration of specific powers. In connection with this indisputable record, the "necessary and proper" clause takes on positive meaning, and Chief Justice Marshall had good and sufficient warrant for giving it the broad interpretation cited above (p. 11).

The General Welfare Clause

After the Committee of Detail reported its draft, there was evidently some dissatisfaction in the Convention with the Section conferring powers on Congress. On August 18 Madison proposed the addition of several specific and general powers, and his resolutions were referred to the Committee of Detail. Four days later the Committee reported back to the Convention a number of propositions, including a clause, to be added to the list of powers conferred on Congress, authorizing it to provide for "the well managing and security of the common property and general interests and welfare of the United States," in such a manner as not to interfere with the internal police of the states or matters for which their authorities may be competent.

This resolution, however, was not adopted. But on September 4, a special committee of the Convention, to which sundry resolutions had been referred, reported an addition to the paragraph conferring taxing powers on Congress. It read: "to pay the debts and provide for the common defence and general welfare of the United States." This addition was adopted and incorporated in the Constitution.

In the final draft of the Constitution reported by the Committee of Style, there were two important additions, among many others, to the draft reported by the Committee of Detail on August 6. The first was the preamble declaring the purpose "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. . . ."

The second was the general welfare clause attached to the taxing power. In the printed draft, which the members of the Convention had before them, it stood: "To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States." After a few minor amendments were made in this printed draft, the whole was engrossed for final adoption and signing. In the engrossed draft the semi-colon between the words "excises" and "to pay" was omitted and a comma substituted by the copyist.

This matter of punctuation may seem trivial but it is important, and wordy debates have turned on it. The point is not only significant in itself, but it illustrates the pitfalls in the way of those who think they *know* what the Constitution really is.

On the ground that there is a semi-colon in the printed draft which the members read, it has been argued that the Convention conferred upon Congress a broad power to provide for the general welfare (See speech of Hon. David J. Lewis in the House of Representatives, August 20, 1935).

Assuming that the comma, not the semi-colon, represents the intention of the Convention, because it appears in the engrossed document read to the members, commentators on the Constitution have argued that the general welfare clause merely limits the taxing power. So the whole paragraph should be understood to mean that Congress, in laying taxes, duties, imposts, and excises, is limited, in this power, to paying the debts and providing for the common defence and general welfare. In fact, other records of the Convention may be cited to support this contention.

But assuming that it was the intention of the framers so to limit the taxing power of Congress, it must be admitted that the general welfare clause is there in the Constitution, and that, if it is a limitation in respect of the purposes of taxation, it is a broad and general limitation. In laying taxes Congress is bound only by the rule that, in taxing and spending money, it cannot go beyond paying the debts and providing for the common defence and general welfare. Accepting this interpretation as valid, then in exercising its taxing and spending powers Congress may do anything that is consistent with the general welfare.

Taken in connection with the Convention's resolution avowing the intention of conferring on Congress power to legislate "in the general interests," both the necessary and proper clause and the general welfare clause must be construed broadly. At all events, this construction is binding on all commentators and practitioners who are faithful to the letter and spirit of the entire record. The conclusion is not altered even if the welfare clause be regarded as a "limitation" on the taxing power of Congress.

Alexander Hamilton's Interpretation

This view of the Constitution drawn from the records of the Convention is supported by Alexander Hamilton in his opinion for President Washington on the constitutionality of the first United States bank. He made extensive use of the "necessary and proper" clause, as well as of specific provisions. He said squarely: "The degree in which a measure [of Congress] is necessary can never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency." In other words, the necessity and propriety of a measure designed to carry into effect enumerated power are matters of opinion, of expediency, and are not matters of legal exactness.

Having interpreted the "necessary and proper" clause broadly, and in keeping with the records of the Convention of which he had been a member, Hamilton then turned to the welfare

clause. In a brief for President Washington, Thomas Jefferson had argued against the constitutionality of the bank, and had contended that Congress could not tax for any purpose it pleased, but was limited to paying debts and providing for the common defence and general welfare. This contention Hamilton considered in the following argument:

> "It is true," he said, "that they [Congress] cannot, without breach of trust, lay taxes for any other purpose than the general welfare; but so neither can any other government. . . . Congress can be considered as under only one restriction which does not apply to other governments—they cannot rightfully apply the money they raise to any purpose merely or purely local. . . .
>
> "The constitutional test of a right application must always be, whether it be for a purpose of general or local nature. If the former, there can be no want of constitutional power. The quality of the object, as how far it will really promote or not the welfare of the Union, must be a matter of conscientious discretion, and the arguments for or against a measure in this light must be arguments concerning the expediency or inexpediency, not of constitutional right."

It is impossible to escape the historical truth or the logic of Hamilton's argument. It was in keeping with the letter and spirit of the Convention's records. And it was accepted and approved by President Washington.

The significance of this case cannot be overemphasized. Hamilton had been a member of the Convention. Washington had presided over its proceedings. Both knew the history of its purposes and actions. Jefferson had not been a member; he was in Paris at the time. Moreover, his party, amid the threatened bankruptcy that followed the War of 1812, re-established the United States bank and justified its action by reference to a similar conception of the Constitution. In the irony of history, the second Bank Act was upheld by Chief Justice Marshall in an opinion which was founded on Hamilton's interpretation of the powers of Congress.

The conclusion seems inescapable: The majority in the Convention intended to confer upon Congress the power to legislate in the general interest and contemplated a broad and liberal

interpretation of national powers. Any other view is out of keeping with the records of the Convention, and is contrary to the expressed conceptions of the leaders who framed the Constitution.

III. State Power Under the Constitution

An Erroneous Theory

It is frequently said, even by informed persons, that, while Congress is limited in its power to deal with social and economic questions, the states have a free hand and should assume full responsibility for disposing of such issues. Indeed, Chief Justice Hughes, in holding most of the National Industrial Recovery Act unconstitutional in 1935, inferred as much. He declared that Congress, in the regulation of interstate commerce, could not control hours, wages, and conditions of employment in local industries, and added that such problems were within the scope of state power. This conception of things is often employed in arguments against Congressional action in the social and economic sphere. The contention is constantly advanced that the central government is neither authorized nor competent to assume large social and economic obligations, however meritorious they may be; and that the states are the proper agencies to deal with hours, wages, unemployment, and social legislation generally.

The Facts in the Case

The truth of the matter is that the power of the states to enact social legislation is sharply curtailed by several clauses in the federal Constitution, especially by the Fourteenth Amendment, which forbids states to deprive any person of life, liberty, or property without due process of law. Under this provision, hundreds of state statutes have been declared invalid by state and federal courts; and state authorities find themselves hampered in every direction by judicial rulings and interpretations.

Among the many local laws touching social and economic matters, which have been held invalid by the Supreme Court,

the following are illustrative: limiting the hours in bakeshops to 60 per week or 10 per day; prohibiting the use of shoddy in manufacturing comfortables; forbidding creameries to buy cream at a higher price in one locality than another; forbidding employment agencies to receive fees from workers; forbidding employers to discharge workmen for joining a union; fixing minimum wages for women in the District of Columbia; authorizing workmen to picket in labor disputes; fixing the rents of tenements after an emergency has passed.

In view of the decisions already rendered by the Supreme Court, it is doubtful whether the states have the power under the federal Constitution to establish such principles as collective bargaining, minimum wages, and fair practices, as contemplated by the National Industrial Recovery Act. The assumption that the states may do anything that the Federal Government cannot do has no foundation in constitutional practice.

The Twilight Zone

Thus there are certain areas of social and economic legislation which, under the Constitution as interpreted by the Supreme Court, neither the Federal Government nor any state government can enter. This haven of refuge for powerful interests that wish to escape all regulation and control by government has been called "the twilight zone." In this shadowy region, private parties may carry on their social and economic activities without fear of successful government intervention from either side—federal or state. If, perchance, they are threatened, their lawyers can carry their case into the courts and seek the protection and enlargement of the twilight zone.

IV. Judicial Guardianship of the Constitution

The Assumption of Power

There is no clause in the Constitution which expressly confers on the Supreme Court the power to declare acts of Congress

invalid, as contrary to the Constitution. Whether the Convention intended for the Court to exercise that authority is still a matter of debate. The issue was not voted on in the Convention. Several members thought that the Court would pass upon questions of constitutionality in the regular course; others did not regard it as a judicial function.

However that may be, Chief Justice Marshall declared a part of a federal law unconstitutional in 1803. And the practice of judicial supremacy has been established by popular acquiescence or approval, or both. It is now recognized that the courts of the United States may hold acts of Congress void, and that the Supreme Court at Washington is the ultimate tribunal of appeal.

Yet the power was at first sparingly exercised by the Supreme Court. Between 1803 and 1857 it did not declare void a single statute passed by Congress. In the latter year, in the Dred Scott case, it nullified the Missouri Compromise prohibiting slavery in the territories north of the line of 36° 30′ and thus blocked the new Republican party in its project for keeping slavery out of the territories belonging to the United States. After the year 1920 cases of judicial intervention increased in number. Between 1920 and 1935 the Supreme Court invalidated more Congressional statutes than during the first hundred years of its existence.

Types of Statutes Invalidated

During recent times a large number of the laws invalidated by the Supreme Court have been social and economic in character. They include the income tax law of 1894; prohibition of child labor; taxation of stock dividends as income; establishment of minimum wages in the District of Columbia; penalizing employers for dismissing employees on account of trade union membership; National Industrial Recovery Act; railway pensions; and modification of contract terms of farm mortgages. At the present moment (November, 1935) the Supreme Court has before it other fundamental statutes of "the New

Deal," including the Agricultural Adjustment Act, the Tennessee Valley Development Act, and the provisions of the housing law authorizing slum clearance.

Responsibility for Unconstitutional Legislation

Both political parties have enacted unconstitutional laws. A study of the history of such legislation by John W. Flannagan, of Virginia, presented to the House of Representatives on August 7, 1935, shows that of 67 statutes nullified by the Supreme Court 42 were passed by Republican Congresses, 20 by Democratic Congresses, and the remainder by divided Congresses, except one adopted by non-partisan vote in the first Congress. It would seem, then, that knowledge of the Constitution and informed loyalty to the Constitution, as tested by subsequent opinions of the Supreme Court, are not limited to the membership and leadership of either party now contending for public favor.

Division of Opinion in the Supreme Court

When the remark is made that "the Supreme Court has invalidated a statute," it must be remembered that, as a general rule, this means a majority of the judges, not the entire body. Seldom is an opinion unanimous. The decision in the National Industrial Recovery Act case and in the Farm Mortgage Act case of 1935 are among the exceptions. More often the Court is divided, with one or more judges dissenting, frequently four of the nine judges dissenting from the majority opinion. For example, in the railway pension case of 1935 four judges dissented, with Chief Justice Hughes leading them. In this manner is illustrated the lack of absolute certainty respecting the meaning of the Constitution, even among legal authorities of high competence and integrity. Uncertainty is further increased by the fact that on more than one occasion the Supreme Court has reversed itself, either directly or by implication, and transformed a dissenting opinion into a majority opinion as the correct interpretation of the Constitution.

Why Judges of the Supreme Court Differ

Since judges of great logical powers and wide information often reach contrary conclusions respecting the meaning of the Constitution, it seems to follow that their conflicting judgments are due to something inside their minds. All look at the letter of the Constitution. All are familiar, more or less, with the records of the Convention and the subsequent history of constitutional development. Yet they differ in their interpretations of the same documents and sources of authority. What is this mental force that inclines the mind of the judge to the one side or the other?

Out of deep knowledge and long judicial experience, Justice Holmes made a satisfactory answer when he said, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." This removes the explanation of differences of opinion concerning the indefinite clauses of the Constitution from the realm of exact science, and carries it over into the realm of feeling and sympathy.

Sources of Sympathy

Thus we are led to inquire: Whence comes the intuition or sympathy which inclines the mind to one side or the other? Is it inherited with the flesh and blood? Are babies from birth narrow or liberal constructionists by heredity? Or are sympathies acquired from associations—political, economic, and cultural? If the issue is concretely considered, there can be no doubt of the answer. With reference to interpretations of the Constitution by the President, Congress, and political leaders, it is openly admitted that inclinations are connected with partisan sources—using the term in no invidious sense. At one time a political party that believes in the strict construction is in power; at another time, a party that advocates the liberal construction.

Thus the Constitution means one thing in one season; another in the next. With a change in parties comes a change in its nature. And shifts in parties depend on variations in public opinion, in the conditions and beliefs of the people, or at least of the thinking and articulate section of the population.

Considerations Governing Judicial Appointments

Although none will deny that partisan considerations deeply affect, if they do not control, interpretations of the Constitution by the political departments of the Government, many contend that the judicial branch, in its operations, is not, or ought not to be, influenced by any such considerations. But this raises some interesting speculations. Judges are chosen by political branches of the Government, by the President and Senate. Do the appointing authorities, in selecting a judge, ignore his previous career, the decisions he has rendered, if he has served in a lower court, the views which he has advocated as a lawyer at the bar? The correct reply is that they do not. The history of appointments, as far as it is recorded, makes this answer emphatic.

In a long letter to Senator Henry Cabot Lodge, written in 1902, with reference to filling a vacancy on the Supreme Bench, President Theodore Roosevelt explained the considerations which governed him in making the appointment.

> "In the ordinary and low sense which we attach to the words 'partisan' and 'politician'," said he, "a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in accordance with which it must go on; and keeping in mind also his relations with his fellow statesmen who in other branches of the government are striving in cooperation with him to advance the ends of government. Marshall rendered much invaluable service because he was a statesman of the national type, like Adams who appointed him, like Washington, whose mantle fell upon him. . . . The Supreme

> Court of the sixties was good exactly in so far as its members fitly represented the spirit of Lincoln. . . . The majority of the present Court who have, although without satisfactory unanimity, upheld the policies of President McKinley and the Republican party in Congress, have rendered a great service to mankind and to this nation."

With this preliminary out of the way, President Roosevelt then turned to the character of the man under immediate consideration for appointment, Oliver Wendell Holmes, of Massachusetts.

> "Now I should like to know," he said, "that Judge Holmes was in entire sympathy with our views, that is, with your views and mine, and Judge Gray's, for instance, just as we know that ex-Attorney General Knowlton is, before I would feel justified in appointing him. . . . I should hold myself as guilty of an irreparable wrong to the nation if I should put in his (Gray's) place any man who was not absolutely sane and sound on the great national policies for which we stand in public life."

Besides taking this broad view of the function of federal judges as statesmen, President Roosevelt also referred to a particular matter—the attitude of the Court toward modern social legislation. Judge Holmes' "labor decisions," he remarked,

> "which have been criticized by some of the big railroad men and other members of large corporations, constitute to my mind a strong point in Judge Holmes' favor. The ablest lawyers and greatest judges are men whose past has naturally brought them into close relationship with the wealthiest and most powerful clients, and I am glad when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients. I think it eminently desirable that our Supreme Court should show in unmistakable fashion their entire sympathy with all proper effort to secure the most favorable possible consideration for the men who most need that consideration."

In due time, Mr. Holmes was appointed and in his decisions took the liberal course, although he did not always conform to President Roosevelt's "policies."

Political Policies Appear in Judicial Appointments

In seeking for judges in general harmony with their views of large public questions, Presidents have often found it necessary to choose men from their own political party. The Federalist President, John Adams, appointed to the post of Chief Justice, John Marshall, an ardent Federalist who had served his party as a member of Congress and as Secretary of State. His successor, Roger B. Taney, a Democrat who had held the post of Secretary of the Treasury, was chosen by a Democratic President, Andrew Jackson. When Taney died in 1864, the Republican President, Abraham Lincoln, put in his place Salmon P. Chase, who had been head of the Treasury Department and was an aspirant for the Republican nomination for President in the very year of his appointment. Chief Justice Taft was a Republican President of the United States before he was elevated to his high judicial post by President Harding, a member of his political party. President Hoover selected his Republican colleague, Charles E. Hughes, to fill the vacancy created by the retirement of Chief Justice Taft in 1930. Exceptions serve to prove the rule.

After all, is it conceivable that the appointing authorities would select a judge who would so interpret the Constitution as to declare null and void significant measures of Congress which they deemed vital to the welfare of the country? In this there is nothing invidious. The fact that they espouse these measures is evidence that they believe in their constitutionality as well as their utility to public welfare. To work for them and then choose judges to defeat them would be a strange procedure.

Indeed high and responsible political leaders have more than once taken the position that it is proper to use the appointing power to secure new judges who will re-read the Constitution, discover that it does not mean what it has been interpreted to mean, and will then reverse the decisions of their predecessors on fundamental issues. "We think the Dred Scott decision is

erroneous," said Lincoln shortly after the Court had rendered its opinion. "We know that the Court that made it has often overruled its own decisions and we shall do what we can to have it overrule this."

The Constitution a Phase of American Thought

It was after reviewing such indubitable facts that the great commentator, Judge Cooley, came to the conclusion that the Constitution is not a mere written document with a determinate meaning which never changes. "We may think," he says, "that we have the Constitution all before us; but for practical purposes the Constitution is that which the Government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing else. . . . Cervantes says: 'Everyone is the son of his own works.' This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."

V. Historic Controversies Over Judicial Decisions

Why Disputes Arise

In exercising the power to declare acts of Congress and laws of the states unconstitutional, the federal courts inevitably become involved more or less in political controversies. An important statute usually reflects the policies of a political party; often it is the fruit of a long and ardent agitation. If it is set aside by a court, warm feelings are naturally aroused. Although the courts, in declaring an act void, seldom depart from the serene and austere logic of the law, they usually do in fact pass judgment upon the wisdom of the measure under scrutiny. Theoretically they do not say what the law ought to be; they

merely proclaim the Constitution as it is. Practically the matter is not so simple, for the language of that document, as we have said above, is very general in some parts. In such cases the judges themselves often disagree—five think the Constitution means one thing and four think it means something else.

What the judges really do in these circumstances, leaving all quibbling aside, is to say whether they believe a particular act of Congress or state law is desirable and expedient at the moment—that is, according to their notion of the facts and contentions involved. Inevitably their adverse rulings awaken political resentments.

Two Classes of Disputes

Broadly speaking, controversies arising from this source fall into two classes. The first includes issues growing out of cases in which the federal courts invalidate state laws. In recent times contests respecting such matters have arisen mainly in connection with the judicial nullification of social and economic measures enacted by state legislatures, particularly under the "due process" clause of the Fourteenth Amendment. Since the power of the Supreme Court to declare state legislation void is now recognized, its wisdom rather than its authority is usually drawn in question in such disputes.

A second type of controversy has grown out of decisions of the Supreme Court setting aside acts of Congress. An exercise of this authority may involve large national questions, and on several momentous occasions it has dragged the Supreme Court into partisan hostilities.

The Dred Scott Case

Perhaps the most famous of all these conflicts occurred in connection with the celebrated Dred Scott case (1857), in which Chief Justice Taney sought to accomplish the impossible feat of settling the slavery issue by a judicial discourse. In principle Taney held that Congress had no constitutional warrant

for abolishing slavery in the territories of the United States. But at the very moment, the new Republican party was staking its hopes and gaining strength on the contention that Congress had full power in the premises and should immediately exercise it.

Owing to the excitement over the slavery question which prevailed at the time, Chief Justice Taney's opinion precipitated a bitter struggle in the political forum. Naturally, Southern leaders accepted his dictum as final. In the North, however, it aroused a storm of protest, and the legislatures of several states passed resolutions condemning his doctrines enunciated in the name of the Court. Maine, for example, expressed her views in the following legislative declaration:

> WHEREAS, such extra-judicial opinion subordinates the political power and interests of the American people to the cupidity and ambition of a few thousand slaveholders, Therefore—
> RESOLVED, that the extra-judicial opinion of the Supreme Court in the case of Dred Scott is not binding in law or conscience upon the government or citizens of the United States, and that it is of an import so alarming and dangerous as to demand the instant and emphatic reprobation of the country.
> RESOLVED, that the Supreme Court of the United States should, by peaceful and constitutional measures, be so reconstituted as to relieve it from the domination of a sectional faction. . . .

On reading Taney's epoch-making opinion, Lincoln, who was to wage war and sacrifice slavery to preserve the Constitution, spoke of the ruling with moderation, but he refused to accept it as the last word on slavery in the territories. Two or three months after it was rendered, he declared his belief in, and respect for, the judicial department of the Government, saying that its decisions should control the policy of the country until reversed by some lawful process.

But in the heat of the fray he grew more belligerent. A year later, in a speech at Edwardsville, Illinois, he exclaimed:

> "Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. Accustomed to trample

> on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people."

Furthermore, Lincoln accepted without reserve the declarations of the Republican platform on which he stood for the presidency in 1860:

> "The new dogma that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country."

In the end fate justified Lincoln and the Republican party. Slavery was abolished not only in the territories, but also throughout the Union.

Income-Tax and Injunction Cases

It was the Democratic party that was to raise the next serious controversy over a judicial action, nearly forty years after the Dred Scott case. In 1895 the Supreme Court, by a narrow vote of five to four, declared unconstitutional the fundamental parts of the federal income-tax law passed by a Democratic Congress during the preceding year—a law avowedly designed to shift a part of the burden of federal taxation from goods consumed by the masses to "accumulated wealth."

When the Democratic national convention assembled in 1896, feelings ran high among the radical elements against the action of the Court. It was openly said that the Court had discriminated against the poor in favor of the rich. At the same time popular indignation was intensified by a conflict over the use of injunctions by the federal courts in labor disputes. Profoundly stirred by such tendencies, leaders in the Democratic

left-wing protested vehemently against the income-tax decision and the injunction, and carried their objections to the convention.

In response to their demands, the chairman of the committee on resolutions brought in a platform containing two sharp attacks on the federal judiciary:

> "We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the Court as it may hereafter be constituted, so that the burden of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the government."

Then referring particularly to the recent railway strike in Chicago, the platform added:

> "We denounce arbitrary interference by federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which federal judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges, and executioners."

In vain did Senator Hill of New York protest against these planks, denouncing them as foolish, ridiculous, unnecessary, revolutionary, and unprecedented in the history of the party. With fierce directness, William Jennings Bryan, in his "crown of thorns and cross of gold" speech, replied to Hill in defense of the party's position:

> "They criticize us for our criticism of the Supreme Court of the United States. My friends, we have made no criticism. We have simply called attention to what you know. If you want criticism, read the dissenting opinions of the court. That will give you criticism."

With this turn in fortune's wheel, Republican leaders now assumed the rôle of defenders of the Supreme Court. Democratic attacks on the decision in the income-tax case they denounced as assaults on fundamental American institutions. The

proposal to reconstruct the Court and secure a reversal of the opinion they assailed as an attempt to drag the judiciary into the mire of politics. Although for a time after the victory of McKinley in 1896, the sound of the conflict died away, the issue did not disappear. In fact, the question remained open until the Sixteenth Amendment to the Constitution displaced by orderly procedure the opinion of the Court and gave to Congress the power which that tribunal had denied.

The Hughes Controversy

In our own day the position of the judiciary in the American political system was again drawn into controversy during a heated debate in the Senate in connection with the elevation of Charles E. Hughes to the Supreme Court early in 1930. While the high standing and personal integrity of the nominee was not denied by any opponents, it was said by his critics that the Court was already dominated by a majority of conservatives and that the appointment of Mr. Hughes would add another powerful weight to that side of jurisprudence. In taking this line of argument, Senator Norris declared:

> "No man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes. . . . During the past five years he has appeared in fifty-four cases before the Supreme Court. Almost invariably he has represented corporations of almost untold wealth. . . . During his active practice he has been associated with men of immense wealth and has lived in an atmosphere of luxury which can only come from immense fortunes and great combinations. . . . His viewpoint is clouded. He looks through glasses contaminated by the influence of monopoly as it seeks to get favors by means which are denied to the common, ordinary citizen. . . . Such men should not be called to sit in final judgment in contests between organized wealth and the ordinary citizen."

To arguments of this character, which were repeated with embellishments in detail, vigorous replies were made on the other side. In upshot, the defenders of Mr. Hughes admitted that his clients had been, in the main, rich men and corpora-

tions, but they insisted that the fact was not germane to the issue.

> "Mr. Hughes," said Senator Gillett, "attracted as clients the great business interests of the country. They are the ones that naturally demand the highest talent; that can pay for the highest talent; and every great lawyer necessarily has them as his clients. . . . However, to say that he thereby accepts their business principles and that thereby his state of mind is so affected that afterwards he cannot sit as an impartial judge, I think, is a very mistaken conclusion. I do not agree that the argument of a lawyer in a case which he is prosecuting is at all a guide as to his decisions upon the bench when he may have to pass upon similar cases. An advocate is compelled to present to the court his side of his case with all the strength of his talent, but when he is appointed to the bench, then he exercises his judicial temperament and passes upon the merits of the case."

After a long dispute in these and similar terms, the Senate approved the appointment of Mr. Hughes, closing this chapter in the development of the judiciary.

VI. Proposals for Obviating Judicial Conflicts

Criticisms of Constitutional Practice

For more than a century judicial supremacy in the American constitutional system, entirely apart from the merits of particular decisions of the Supreme Court, has been a subject of analytical and critical comments. These comments have ranged from radical to conservative. Long ago Thomas Jefferson insisted that the three branches of the Federal Government were equal and coördinate, and that to allow the Supreme Court to declare acts of the legislative and executive branches unconstitutional was to make it supreme over those branches—in violation of the letter and spirit of the Constitution.

In our own day, Governor Harold G. Hoffman of New Jersey has referred to the anomaly of having acts of Congress declared

invalid two or three years after they have been passed and put into force. On the ground that this practice makes for confusion and uncertainty, Governor Hoffman proposed an amendment to the Constitution providing that the acts of Congress should be referred immediately to the Supreme Court for a decision as to validity before they are put into effect. Other proposals touching the subject have been made and widely discussed from time to time, especially during constitutional controversies. A few of them have been especially prominent.

The Education of Judges

Many years ago, amid the debates raised by Theodore Roosevelt and the progressive movement, Professor Frank J. Goodnow, then of Columbia University, in a work called *Social Reforms and the Constitution,* drew attention to the necessity for new legislation to meet changing social and economic conditions, and to the difficulty of amending the federal Constitution after each narrow judicial interpretation of the document. In such circumstances, he argued that the most available method for keeping the Constitution flexible and adjusted to changing conditions was to educate backward-looking judges by informed criticism. "In these days of rapid economic and social change," he says,

> ". . . it is on this criticism, amply justified by our history, that we must rely if we are to hope for that orderly and progressive development which we regard as characteristic of modern civilization."

Limitation of the Court's Powers

At the other extreme are proposals to deprive all courts of the power to declare acts of Congress invalid on constitutional or other grounds. The milder critics who hold to this view propose to accomplish their end by a constitutional amendment. Others of the same school maintain that no amendment is necessary and employ the following argument.

The original jurisdiction of the Supreme Court under the Constitution is very limited, by express terms, and does not include any jurisdiction over the validity of statutes. Its appellate jurisdiction is fixed by Congress, and Congress may determine the types of cases that can be carried before the Supreme Court on appeal. Congress can likewise determine the jurisdiction of all lower federal courts and may forbid them to assume jurisdiction over any cases involving the validity of federal statutes.

By taking action along this line, it is contended, Congress may deprive the courts of jurisdiction over constitutional cases and thus of the power to invalidate acts of the national legislature. Those who advocate this method of dealing with the issue of "judicial supremacy" cite the act of Congress passed in 1868, under Republican auspices, depriving the Supreme Court of jurisdiction over one type of cases involving constitutionality, and also the decision of the Supreme Court sustaining the act of Congress in question. (Haines, *The American Doctrine of Judicial Supremacy,* pp. 387-89).

A variant on this proposal has been suggested by David J. Lewis, a member of the House of Representatives from Maryland. He would permit the courts to enjoy jurisdiction over the constitutionality of cases involving personal liberty (freedom of press, speech, etc.) and deprive them of jurisdiction over the constitutionality of social and economic legislation.

Supplementary Proposals

Other proposals for dealing with judicial control are less drastic. It has been suggested that judicial nullification be treated as a kind of veto and that Congress be allowed to repass nullified statutes by a two-thirds vote and make them law in spite of judicial objections. Another project calls for an extraordinary majority of the judges—two-thirds or unanimity—whenever the Supreme Court invalidates a statute.

To the list may well be added Governor Hoffman's scheme mentioned above: Require the Supreme Court to pass immedi-

ately upon the validity of acts of Congress, so as to remove quickly all uncertainty respecting their constitutionality. Indeed, a few states, including Massachusetts and Colorado, require their courts to render advisory opinions to their legislatures on the constitutionality of bills pending. In this way legislatures can discover in advance whether any proposed measure comes within the limits of constitutional powers, and the inconvenience of litigation, delay, and uncertainty can be largely obviated.

VII. The Amendment of the Constitution

The ultimate tribunal for the settlement of constitutional issues is the whole body of American citizens entitled to exercise the right of suffrage; and the framers of the Constitution made provision for appeals to this court of last resort. They incorporated a process of amendment in Article V. This process is, indeed, thorough-going and should be examined in detail, especially as certain parts have been neglected in practice.

In the first place, provision is made for calling a new constitutional convention for the purpose of considering and proposing amendments. On application of the legislatures of two-thirds of the states, Congress shall call such a convention.

In the second place, "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution." Amendments so proposed are to be valid parts of the Constitution when ratified (a) by the legislatures of three-fourths of the states or (b) by conventions in three-fourths of the states, as the one or the other method of ratification may be required by Congress.

Three prime considerations led to the incorporation of the amendment clause in the Constitution.

None of the leaders in the Convention which framed the Constitution was entirely satisfied with it. Washington de-

clared that there were some things in it which did not, and never would, he was persuaded, obtain his cordial approbation. Hamilton exclaimed to the Convention, "No man's ideas are more remote from the plan than mine are known to be." They accepted the document because they thought it the best that could be secured in the circumstances and contained promises of good. In the amendment provision the framers doubtless saw an arrangement for bringing the Constitution more in line with their desires, if time favored change.

The framers of the Constitution also knew that their plan would meet with strong popular opposition and they were able to point to Article V as giving critics an opportunity to add their ideas in the form of amendments, after the adoption of the main body of principles contained in the original instrument. Washington himself used this argument:

> "As the Constitutional door is open for future amendments and alterations, I think it would be wise in the People to accept what is offered to them."

All the outstanding members of the Convention, especially James Madison who proposed Article V to the assembly, recognized the mutability of human affairs. They had passed through a long revolutionary war and the vicissitudes of the reconstruction that followed. They looked down the years to come and foresaw, often with uncanny prescience, immense changes ahead in the United States. If the Constitution was to endure, as they hoped, time would make alterations necessary. Moreover, in forming the Constitution, they had employed the democratic process of proposition, discussion, and popular ratification, and had avoided the historic method of resort to the sword. If the Constitution was to last for ages, if resort to reform by violence was to be prevented in the future, then provision must be made for amendment by due and orderly process.

Nor did the framers of the Constitution regard the proposal and adoption of Amendments an unholy profanation of their handiwork. In fact, leaders among them took part in fram-

ing and adopting ten amendments within two years after the Constitution went into effect.

It was left to smaller minds in later times to look upon the very idea of amending the Constitution "with alarm." There is nothing in the great tradition of American statesmanship to sanction the view that the proposal of amendments to the Constitution is to be treated as improper or as "tampering with a sacred document."

By a liberal interpretation of the language of the Constitution, and by the adoption of amendments, the general form of government established by the Fathers has been preserved amid the radical changes that have occurred in American society since 1789. In the present hour we have, as they had, the lamp of experience to guide us. If flexibility has been required in the past, surely it will be necessary in the future, unless government by popular proposal, discussion, and adoption is to perish from the earth.

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